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# Capital Defense Representation

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## CAPITAL DEFENSE REPRESENTATION

*Norman Lefstein*

I want to make a couple of preliminary comments about the Report. First, while my comments are a critique of some parts of the Report, I believe that it is a very positive Report in many respects. And I think it adds a great deal to the debate over capital punishment in this country, and its recommendations would do much to achieve greater fairness and accuracy in the administration of the death penalty.

Second, I want to make a comment that relates to the death penalty in the United States and how it's administered. The Report, at page four states, that it should not be interpreted as a criticism of any existing death penalty system in other jurisdictions. The Report does not explain why it is not a criticism of death penalties in other jurisdictions. In reality, it is in many respects a stinging indictment of the way the death penalty is administered throughout the United States. That may not have been the intent of the Report, as the Report declares, but it is, in fact, a reality of the Report.

A third observation relates to the political nature of the death penalty. I believe that it is extremely likely that if a state like Massachusetts were to narrow the list of crimes for which the death penalty could be imposed and make it far more difficult to achieve a conviction in a death penalty case, there would be very few cases that prosecutors would want to prosecute as death penalty cases. Indeed I wonder why, in a state like Massachusetts, which has one of the lowest homicide rates in the country, the state would want to have a death penalty at all, especially given the fact that, as the Report itself concedes, the death penalty cannot be justified upon principles of general deterrence.

My thinking about why the death penalty will be so resisted by prosecutors is informed, in part, by some work I did here in Indiana in the mid-1990s. In the early 1990s, Indiana improved the way in which we provide counsel in death penalty cases. I don't think what we do here in Indiana is a panacea, but it is certainly better by far than it used to be. After we improved the standards for counsel in the capital cases, I conducted a study in which I interviewed a number of prosecutors. On promises of confidentiality, a number of them confided in me that in view of the way defense counsel were now representing death cases in Indiana, they didn't want to ask for the death penalty. As one prosecutor candidly remarked to me, "it's a real knock on the prosecutor" to ask for the death penalty and fail. It hurts at reelection.

Now I want to make several specific comments about the recommendations in the Report. As far as death-eligible murders are concerned, like Edwin and Paula, I certainly think narrowing the list is positive. I do have concerns about using a prior murder conviction in Massachusetts, or in any other jurisdiction, as a predicate for the death penalty, because I am not sure you can have absolute confidence in the accuracy of the prior murder conviction. That murder conviction may have been obtained under circumstances where the representation of defense counsel was woefully inadequate. And, Massachusetts itself has had instances, as has almost every state, of defendants who were released because they were, in fact, innocent. So I'm troubled by making a prior murder conviction from Massachusetts or elsewhere a predicate offense.

Of course, the Report, as noted by others, reduces the number of aggravators as a basis for the death penalty. But, I think, like my colleagues who have already spoken, there is no reason to think that the list will not be expanded in Massachusetts, as it has

in other states. If you can figure out a way to keep it from expanding, I would be interested in hearing it.

I think that you have to commend a recommendation that calls for the Attorney General or, as Edwin suggested, perhaps a committee, to review all decisions across the state to seek the death penalty. One of the things we know from research in this country is that different prosecutors approach the death penalty very differently. In some counties you will see it frequently sought and in others you won't. For example, in Texas one may compare the situation in Harris County, where Houston is located, and Dallas County. In Harris County, the prosecutor for many years had not changed. This prosecutor in Harris County constantly asked for the death penalty, and far exceeded the number of death penalty requests in Dallas County on a per capita basis.

So having an Attorney General or a committee review death penalty requests is very commendable. However, I have to wonder whether or not over time you can achieve the fairness that you want, because prosecutors come and go and prosecutors have different orientations toward the death penalty. Indeed, we've seen it at the national level where clearly there has been a different orientation towards death penalty requests between Attorney General John Ashcroft and Attorney General Janet Reno.

Let me say a few words about the defense counsel recommendations. While I commend the recommendations, I don't think they go far enough. It is not clear to me from these recommendations, though it may have been intended, that something more than objective criteria are required to qualify counsel to handle capital cases. I don't think objective criteria are sufficient. There is some reference here to performance, but it's not fleshed out fully and I can't really tell from the Report what was intended. But one of the things we've learned is that lawyers can meet objective criteria because of the number of cases they've handled previously, including capital cases, and yet they can be terribly deficient in defending a capital case. The sleeping lawyer in Texas, I think, would have met objective criteria for handling a death penalty case. And therefore, it's very important that there be peer review of the prior performance of defense counsel, so that you are examining what the lawyer did in prior cases, looking at transcripts in prior cases, and not simply giving any lawyer who meets objective criteria the green light to defend a capital case.

In addition, I think the whole process of deciding upon lawyers to handle capital cases ought to be vested in an independent authority and not in judges. The American Bar Association's revised death penalty guidelines, approved by the ABA House of Delegates in February of 2003, recommended an independent authority to review and certify lawyers as death-eligible and not to allow any exceptions to be made. The Massachusetts Report, moreover, sanctions the notion of a judge waiving the requirement of capital-eligible qualified counsel. I think that's a mistake. I think there's a history in this country of judges allowing defense lawyers to handle cases when in fact they should not have been permitted to handle the cases at all. And judges have simply sat silently while lawyers have done some terrible things in representing their clients in capital cases.

Let me wind this up with one or two other comments about representation. The Report, I think, is deficient in not explicitly recognizing the importance of mitigation specialists in capital cases. You cannot defend a capital case without having available persons to investigate the defendant's background, gather social history information, and have it available at the sentencing stage. The Report certainly doesn't say you can't do that, but the matter is of such paramount significance that I believe it should have been specifically mentioned in the Report itself.

And, finally, I want to say a word about compensation. The Report says that there ought to be adequate compensation for defense counsel in death penalty cases. And of course, there should, but the Report doesn't really go beyond this brief statement. The reality in this country is that indigent defendants in criminal cases everywhere are represented by lawyers who are paid at a discount. We just don't provide adequate compensation! Ironically, in Massachusetts there are terrible problems in providing counsel for defendants in criminal cases right now, largely because the compensation paid to defense counsel is so inadequate. There is litigation right now before the Massachusetts Supreme Judicial Court on this issue. The fees paid to assigned counsel—the lawyers upon whom Massachusetts relies very heavily—are \$30 an hour in District Court, \$39 an hour in Superior Court, and \$54 an hour in murder cases. And increasingly, assigned counsel have been refusing to handle criminal cases. Therefore, what you need to do is make certain that you have compensation that is far above what is now being paid in criminal cases in Massachusetts. And we have learned that when you don't have adequate compensation the best lawyers won't take the cases.

In the study that I did in the nineties here in Indiana I interviewed a number of the best criminal defense lawyers in the state who also have private practices. And they told me they would not take a capital case in the state of Indiana. At that time Indiana was paying \$70 an hour in capital cases. They said they might be willing to defend a capital case in federal court, which was paying \$125 an hour, but they were not sure. We need to understand that the billing rates among the best lawyers in this country, on the average, in a study reported a couple of years ago by Altman and Weil, are \$275 an hour for a partner. That's an average throughout the United States for a partner in a major law firm. When you're asking lawyers to defend a capital case—the most important kind of work they can undertake in the criminal area—it is absolutely shameful that they are not better compensated.

The defense of a capital case can take upwards of 500 to 1,000 hours just for the trial itself. That is a half year's work or more for a criminal defense lawyer. I genuinely wonder whether Massachusetts, which thus far has been unwilling to fund defense counsel at reasonable rates of compensation in other criminal cases, will be willing to do so in the capital area. In Indiana we have increased, incidentally, from \$70 an hour. We have a cost of living adjustment built into the rule so that beginning January 1, 2005, the state will pay the grand sum of \$96 an hour. And that's much better than most states around the country.

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#### THE PROCESS OF THE GOVERNOR'S COUNCIL

*Michael J. Sullivan*

As a member of the Governor's Council I want to briefly touch on the process we went through in producing this Report. First, it was a collection of attorneys, both defense and prosecutors. The judiciary was represented, as was the scientific and the legal scholar community. Professor Hoffmann mentioned that he is not sure even today which members of the Council were death penalty proponents and which members of the Council were adamantly opposed to any type of death penalty proposal in Massachusetts. Quite candidly, I'm not sure either. You might be able to get a sense of this during the course of discussion about the number of aggravating circumstances that